No. 22631

IN THE

United States Court of Appeals

For the Ninth Circuit

PETER F. COMSTOCK; ANN FETTER; SUE D. GOTTFRIED; IRWIN R. HOGENAUER and SELMA WALDMAN,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

BRIEF OF APPELLANTS

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JURISDICTION

Appellants were charged by information in the United States District Court for the Western District of Washington, Northern Division, of being in violation of R.C.W. 9.27.060(2).

By virtue of 18 U.S.C.A. § 7, 13 the state criminal code is made applicable to offenses alleged to have been committed on lands reserved or acquired for the use of the United States Government, where the act alleged to have

been committed is not made punishable by an enactment of Congress.

This case went to trial on December 27, 1967 and ended the same day. The court found appellants guilty as charged (Tr. 103).

Immediately after the court's oral pronouncement of guilt and upon adjournment of court, appellant Hogenauer refused to rise (R. 52). Appellant Hogenauer was adjudged in contempt of court (R. 53) and subsequently sentenced to 15 days in jail (R. 73).

On January 19, 1968 the court entered judgment and sentence as follows:

> "1. Appellants Comstock and Fetter – 30 days in jail and a fine of $300; jail sentence was suspended and a 2-year probation imposed (R. 75). On January 26, 1968 the aforesaid sentence was vacated on to appellant Comstock and he was granted a deferred sentence for a period of 2 years (R. 107).
>
> "2. Appellants Gottfried and Waldman—Jail sentence of 60 days plus a $500 fine; jail sentence suspended upon a two-year probation;
>
> "3. Appellant Hogenauer for violation of 18 U.S.C.A. § 7, 13 and R.C.W. 9.27.060(2). Jail sentence of 1 year and a fine of $1,000. Jail sentence suspended following 60-day imprisonment, upon a 5-year probation. Appellant Hogenauer for violation of 18 U.S.C.A. § 401; jail sentence of 15 days said term to run consecutively to the jail sentence imposed for violation of 18 U.S.C.A. § 7, 13 R.C.W. 9.27.060(2)."

On January 26, 1968 appellants filed Notice of Appeal (R. 109).

The U. S. Circuit Court of Appeals for the Ninth Circuit has jurisdiction by virtue of Section 1291 of the Judicial Code Title 28 U.S.C.A. §1291.

STATEMENT OF THE CASE

On October 17, 1967 at approximately 8:30 a.m. a group of some 200 persons gathered around the Federal Office Building located at 1st and Marion Street in the City of Seattle, Washington (Tr. 20). Shortly thereafter many of these people entered the building in groups of 5 to 10 and entered the office of Group A of Local Selective Service Boards of King County, Washington, located in this building (Tr. 21). The entrance and exit of these persons was orderly and peaceful and the normal operation of the board continued (Tr. 20, 21). At about 8:50 a much larger crowd of people entered the building, so that it became difficult to enter the Selective Service Office (Tr. 21).

At approximately 10:30 a.m. a number of persons sat down in a double doorway, the entrance to the Selective Service Office, and in a doorway leading to a small foley some 20 feet to the east of the entrance to the Selective Service Office (Tr. 23, 24).

These people were quite peaceful and made no disturbance except for blocking the doorway (Tr. 40).

All of the appellants were identified by various police officials as being persons arrested by them for blocking either of the aforedescribed doorways (Tr. 43, 44, 50, 58, 59, 62, 63, 73).

While appellants Gottfried and Hogenauer were identified as having been in the building and having been arrested while being seated in a doorway (Tr. 43, 44, 73), there was no testimony that these particular defendants were assembled with others in this activity.

Following presentation of appellees' case, counsel for

appellants rested and moved to dismiss (Tr. 89). This motion was denied (Tr. 102). The court then found appellants guilty as charged (Tr. 102).

Following the court's pronouncement, the bailiff was ordered to adjourn court. At the call of everybody rise, appellant Hogenauer remained seated (R. 70). The court instructed appellant Hogenauer to rise or be adjudged in contempt (R. 70). Appellant Hogenauer remained seated (R. 70). The court ordered appellant Hogenauer to be carried forward and he was dragged forward by the Marshal (R. 70, 71). Appellant was thereupon found in contempt (R. 71).

SPECIFICATION OF ERRORS

1. The court erred in denying appellants' motion to dismiss on the grounds the R.C.W. 9.27.060(2), is in violation of the Constitution of the United States (Tr. 102).

2. The court erred in entering a verdict of guilty as to the appellant Hogenauer and Gottfried inasmuch as there was no evidence from which it could be determined that the aforesaid appellants were in fact unlawfully assembled.

3. The court erred in holding the appellant Hogenauer in contempt of court (R. 67, 73).

4. The court erred in exercising Summary Power pursuant to Rule 42(a).

SUMMARY OF ARGUMENT

I.

R.C.W. 9.27.060(2), is unconstitutional on its face

inasmuch as it purports to hold unlawful acts that are constitutionally protected. Appellants to challenge this statute need not demonstrate that their actions are constitutionally protected.

II.

There was no evidence that appellants Hogenauer and Gottfried assembled with two or more persons in a manner to disturb the public peace.

III.

Appellant Hogenauer's failure to rise at the adjournment of court did not constitute contemptuous conduct.

IV.

Appellant Hogenauer's conduct was not such as to require summary contempt procedure pursuant to Rule 42(a), in that it neither threatened the court nor obstructed justice.

ARGUMENT

I.

R.C.W. 9.27.060(2) Is in Violation of the Constitution of the United States

Appellants were convicted for alleged violation of R.C.W. 9.27.060(2):

> "Whenever *three or more persons* shall assemble with intention . . .
>
> "(2) To carry out any purpose in such a manner as to disburb the public peace . . . such an assembly is unlawful, and every person participating therein by his presence . . . shall be guilty of a gross misdemeanor" (Italics added).

Appellees' authority to invoke this particular state statute is derived from Title 18 U.S.C.A. 7, 13.

The vice of R.C.W. 9.27.060(2), is in purporting to hold unlawful actions that have constitutional protection, if by the exercise of these actions there is a breach of the public peace.

The United States Supreme Court in a series of decisions has addressed itself to problems created by similar statutes. In *Stomberg v. California*, 283 U.S. 359, 369, Chief Justice Hughes expounded the underlying rationale for striking down such legislation, stating:

> "The maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that change may be obtained by lawful means, an opportunity essential to the security of the Republic is a fundamental principle of our constitutional system.
>
> "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit punishment of the fair use of this opportunity, is repugnant to the guarantee of liberty contained in the Fourteenth Amendment."

Another landmark decision in this area is *Terminiello v. Chicago*, 337 U.S. 1, 93 L.Ed. 1131, 69 S.Ct. 894 (1948). The defendant was tried and convicted for being in violation of the following city ordinance:

> "Code of Chicago, 1939, Sec. 193-1 . . .
>
> "All persons who shall make aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace or diversion tending to a breach of the peace, within the limits of the city shall be deemed guilty of disorderly conduct . . ."

The trial court defined breach of the peace as "mis-

behavior which violates the public peace and decorum" and that the "misbehavior may constitute a breach of the peace if it stirs up the public to anger, invites dispute, brings out a condition of unrest, or creates a disburbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."

In its consideration of this case the Supreme Court did not reach the question of whether the substance of Terminiello's speech was protected by constitutional guarantees, holding there was a preliminary question dispositive of the case. The court went on to state the following:

> "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *DeJonge v. Oregon,* 299 U.S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> "Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.
>
> "That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire,* 315 U.S. 368, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.

> See *Bridges v. California,* 314 U.S. 352, 362; *Craig v. Harney,* 331 U.S. 367, 373. There is no room under our constitution for a more restrictive view. For the alternative would lead to a standardization of ideas either by legislatures, courts, or dominant political or community groups.
>
> "The ordinance as construed by the trial court seriously invades this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand."

More recently in several cases involving civil rights demonstrations, the court has reaffirmed the position espoused in *Stomberg* and *Terminiello, supra.*

In *Edwards v. South Carolina,* 372 U.S. 229, 9 L.Ed.2d 697, 83 S.Ct. 680 (1963), the defendants were convicted of the common law crime of breach of the peace. The Supreme Court of South Carolina in affirming the convictions admitted the term breach of the peace was not susceptible of exact definition, but generally defined it as a violation of the public order by an act or conduct inciting violence or an act likely to produce violence, it not being necessary that the peace actually be broken to lay the foundation for the offense. Peace was defined as ". . . the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society."

The petitioners (defendants below) contended that there was a complete absence of any evidence of the commission of this offense. The court, however, did not choose to entertain this contention. It stated rather at page 236:

"We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the state house grounds were open to the public this would be a different case. See *Cantwell v. Connecticut*, 310 U.S. 296, 307-308; *Garner v. Louisiana*, 368 U.S. 157, 202 (concurring opinion).

"As in the *Terminiello* case the courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech 'stirred people to anger, invited public dispute, or brought about a condition of unrest.' A conviction resting on any of these grounds may not stand."

Cox v. Louisiana, 379 U.S. 536, 13 L.Ed.2d 471, 85 S.Ct. 453 (1965), involved convictions for disturbing the public peace, obstructing public passages and courthouse picketing. The court's discussion of the breach of the peace conviction is most applicable to the instant case.

The court characterized La. Rev. Stat. Sec. 14:103:1 Cum. Supp. 1962, upon which the Breach of the Peace conviction rested, in the following manner:

"The statutory crime consists of two elements: (1) congregating with others, 'with intent to provoke a breach of the peace or under circumstances such that a breach of the peace may be occasioned, and (2) a refusal to move on after having been ordered to do so by a law enforcement officer.'

"While the second part of their offense is narrow and specific, the first element is not. The Louisiana Supreme Court, in this case, defined breach of peace as 'to agitate, to arouse from a state of repose, to

molest, to interrupt, to hinder, to disquiet.'"

The court once again chose to rest its decision on the unconstitutionality of the Louisiana statute rather than on the sufficiency of the evidence, stating at page 545,

> "As in *Edwards,* we do not find it necessary to pass on appellants contention that there was a complete absence of evidence so that his conviction deprived him of liberty without due process of law."

Using *Edwards v. South Carolina, supra,* and *Terminiello v. Chicago, supra,* as precedent the court reversed the conviction:

> "The Louisiana statute, as interpreted by the Louisiana Court, is at least as likely to allow conviction for innocent speech, as was the charge of the trial judge in *Terminiello.* Therefore, as in *Terminiello* and *Edwards* the conviction under this statute must be reversed as the statute *is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly.* Maintenance of the opportunity for free political discussion is a basic tenent of our constitutional democracy. *Stromberg v. California,* 283 U.S. 359, 369. *A statute which upon its face, and as authoritatively construed, is so vague, and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantees of liberty contained in the Fourteenth Amendment*" (Emphasis ours).

Most recently, in *Ashton v. Kentucky,* 384 U.S. 195, 16 L.Ed.2d 469, 86 S.Ct. 140 (1966), the Supreme Court again rejected the type of statute represented by R.C.W. 9. 27.060(2).

The defendant was here convicted of criminal libel. The trial court in defining criminal libel stated that among other things it included "any writing calculated

to create disturbances of the peace."

The court in reversing stated at page 200:

> "Convictions for breach of the peace where the offense was imprecisely defined were similarly reversed in *Edwards v. South Carolina* (citation omitted) and *Cox v. Louisiana* (citation omitted). These decisions recognize that to make an offense of conduct which is "calculated to create disburbances of the peace" leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the comments *per se*. This kind of criminal libel 'makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.'
>
> "*Chaffee, Free Speech in the United States,* 151 (1954):
>
> "'Here as in the cases discussed above we deal with First Amendment rights. Vague laws in an area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech and press suffer. We said in *Cantwell v. Connecticut, supra,* that such a law must be narrowly drawn as to prevent the supposed evil, 310 U.S. 30, 84 L.Ed. 1220, 128 A.L.R. 1352, and that a conviction for an utterance based on a common law concept of the most general and undefined nature, Id. at 308, 84 L.Ed. 1220, 128 A.L.R. 1352, could not stand.'"

In all of the above cited cases, the Supreme Court found that the statutes (or common law crimes in the cases of *Ashton v. Kentucky, supra,* and *Edwards v. South Carolina, supra),* as authoritatively construed by the highest court of the particular state was unconstitutional because it swept within its scope actions that demanded constitutional protection. There has been no

authoritative construction of R.C.W. 9.27.060(2), by the Washington Supreme Court. However, a careful reading of the statute can leave little doubt as to its ultimate effect.

The only phrase that might lend itself to varying judicial interpretation is "disturb the public peace." This particular phrase, however, has been defined in *Smith v. Drew,* 175 Wash. 11, 26 P.2d 1040 (1933):

> "The term breach of the peace is a generic term, and includes all violations of the public peace or order calculated to disturb the public tranquility enjoyed by citizens of the community. Illustrations are legion, and in many of them 'fighting or rioting' is not a necessary element at all."

This definition is the same as that propounded by the Illinois court in *Terminiello v. Chicago, supra,* and the Louisiana court in *Cox v. Louisiana, supra.*

The remaining phrases of this statute are not subject to dispute. The meaning of the phrase "whenever three or more persons shall assemble" is self-evident. The only problem presented by this particular phrase is evidentiary. The remaining phrase, "with intent to carry out any purpose," can only be read literally. One cannot engraft upon this phrase the limitation of "any purpose not protected by the Constitution of the United States." The constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done." *People v. Lawrence,* 68 Ariz. 242, 295 P.2d 4 (1956); *C. F. Hernandez v. Frohmitle,* 140 Cal. App.2d 133, 204 P.2d 854 (1949); *General Outdoor Advertising Company v. Goodman,* 128 Colo. 344, 262 P.2d 261 (1953); *High Point Surplus Company v. Pleas-*

ants, 264 N.C. 650, 142 S.E.2d 697 (1965).

This statute is aimed at the prevention of each and every act by three or more persons assembled together which breaches the public peace. It could be used by the authorities to break up an assembly of persons who arouse the temper of a community by expressing unpopular political views. It could suppress crowds gathering to see a sporting event if by their gathering they were noisy, blocked traffic or annoyed the homeowners who surround a stadium. A St. Patrick's Day parade in the wrong community could incite onlookers to violence.

The Washington Supreme Court had before it in the recent case of *City of Seattle v. Drew*, 70 Wn.2d 383, 423 P.2d 522 (1967), the following ordinance:

> "Seattle Ordinance No. 16046, Sec. 29 . . .
>
> "It shall be unlawful for any person wandering or loitering abroad, or abroad under other suspicious circumstances, from one-half hour after sunset to one-half hour before sunrise to fail to give a satisfactory account of himself upon the demand of any police officer."

This ordinance was fraught with many of the same deficiencies as R.C.W. 9.27.060(2). It was urged in defense of this statute that the good judgment of the police officers would prevent an unconstitutional application of this statute. Without in any manner considering the conduct of the individual charged, the court held the statute unconstitutional, and in response to the city's contention stated:

> "This assurance, however, does not save the ordinance because 'well intentioned prosecutors . . . do not neutralize the vice of a vague law.' *Baggett v. Bullitt,* 377 U.S. 360, 373, 12 L.Ed.2d 377, 84

> S.Ct. 1316 (1964). *The law should be so drawn as to make it inapplicable to cases which obviously are not intended to be included within its terms.* The Seattle ordinance imposes sanctions upon conduct that may not manifest an unlawful purpose and, therefore is violative of due process of law. The language of the ordinance is too broad, it is vague" (Emphasis ours).

Application of this same standard of R.C.W. 9.27.060 (2) leads to the conclusion that it too would be considered too vague and too broad by the Washington Supreme Court.

The focus of R.C.W. 9.27.060(2), is on the reaction of the community to the offender's action and not to the action itself. The danger of this type of legislation caused the Supreme Court to remark in *Cox v. Louisiana, supra,* at page 482: "Here again, as in *Edwards* this evidence showed no more than that the opinions which . . . (the students) were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection. *Edwards v. South Carolina, supra,* 372 U.S. 237, 9 L.Ed.2d 703. Conceding this was so, the 'compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.' *Watson v. Memphis* 373 U.S. 526, 535, 10 L.Ed.2d 529, 536, 83 S.Ct. 1314."

The true effect of R.C.W. 9.27.060(2), is to subject the exercise of free speech and free assembly to a majority vote. It effectively curtails all assertion of views that might bring forth an angry response. The government should not be permitted the use of this statute to further the prosecution of any offender.

Appellants do not contend in this brief that the particular acts of blocking the doorway of the Selective Service Office are acts that are entitled to constitutional protection. However, this is not a prerequisite to attacking R.C.W. 9.27.060(2), as being unconstitutional on its face. In *Ashton v. Kentucky, supra,* it was not contended that the defendant had constitutional license to accuse various individuals of mayhem, embezzlement, conspiracy to murder, and attempted bribery. The court simply examined the Kentucky court's definition of the crime of criminal libel and determined that it was possible to convict an individual who was asserting a constitutional right.

The court reversed Ashton's conviction without reaching the question of whether his particular writings were constitutionally protected.

In *NAACP v. Button,* 371 U.S. 415, 432, the Supreme Court set out the rationale for overturning statutes where the petitioner had not urged an infringement of his constitutional rights other than being prosecuted under the particular statute.

> "Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill v. Alabama,* 310 U.S. 88, 97, 98; *Winters v. New York, supra,* at page 518-520; *C. F. Staub v. City of Baxley,* 355 U.S. 313. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice

> to a criminally accused or upon unchanneled delegation of legislative power, *but upon the danger of tolerating, in the area of First Amendment Freedoms, the existence of a penal statute susceptible of sweeping and improper application. C. F. Marcus v. Search Warrant,* 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanction may deter their exercise almost as potently as the actual application of sanctions. *C. F. Smith v. California, supra,* at page 151-154; *Speiser v. Randall,* 357 U.S. 513, 526. Because First Amendment Freedoms need breathing space to survive, government may regulate in the area only with narrow specificity" (Emphasis ours).

Recently Justice Brennan in *Dombrowski v. Pfister,* 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965), reaffirmed this same concept stating at page 486:

> "Because of the sensitive nature of constitutionally protected expression we have not required that all those subject to overbroad regulation risk prosecution to test their rights. For free expression—of transcendant value to all society, and not merely to those exercising their rights—might be the loser (cite omitted).
>
> "For example, *we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity*" (Emphasis ours).

R.C.W. 9.27.060(2) has a "chilling effect" on the First Amendment freedoms of speech and assembly. In the hands of an ill-intentioned prosecutor it represents a grave danger to the exercise of these rights.

II.

There Was No Proof of Assembly by Either Defendant Irwin Hogenauer, or Defendant Sue D. Gottfried

Under R.C.W. 9.27.060(2) the necessary elements of the crime are (a) the assemblage of three or more persons; (b) with a common intent to carry out a purpose; (c) in such a manner as to disturb the public peace.

The testimony was that between the hours of 8:30 and 10:30 on that morning, there was a peaceful demonstration of approximately 200 young people, both outside and inside the Federal Office Building in Seattle, Washington, and that around 10:30 a.m. some seven or more people sat down so as to block the entrance of the Selective Service Office (Tr. 20-21, 30, 39, 58, 61-62, 74). The persons thus sitting there were removed by the police but individually returned repeatedly and sat down again in front of the Selective Service Office. Some of them were eventually arrested.

As to the defendants other than Mr. Hogenauer and Mrs. Gottfried, the testimony was that they sat down together with two or more persons in front of the door of the Selective Service Office in a manner such as to obstruct passage into the office (Tr. 33, 34, 53, 66, 67; Ex. 5).

As to Mr. Hogenauer and Mrs. Gottfried, no such evidence was presented. As to them, evidence was as follows: Inspector LaPoint, of the Seattle Police Department, testified that a group of people sat down in the hallway (Tr. 31), but he failed to testify that Mr. Hogenauer or Mrs. Gottfried were among them. Officers

Tanner and Husby testified that they took Mrs. Gottfried out of the building (Tr. 43, 80), and that at that time she was sitting in the doorway to the office (Tr. 44, 82-83), but they failed to state that anyone else was sitting there with her.

Officer Tripp testified that he assisted in the arrest of Mr. Hogenauer (Tr. 60), at a time when Inspector LaPoint and another officer were dragging him down the hallway (Tr. 78).

Officer Blackwood testified that he arrested Mr. Hogenauer, who was sitting blocking the doorway on the left-hand side of the Selective Service Office (Tr. 75), but failed to testify as to whether he was there by himself or with others. Thus, no oral testimony showed that either Mr. Hogenauer or Mrs. Gottfried (1) assembled with others, or (2) had a common purpose with others.

Exhibit 8 shows Mr. Hogenauer being removed from in front of the doorway. It also shows what appears to be legs of two other persons. There was no testimony as to the owners of those legs or whether the owners had "assembled" with Mr. Hogenauer to carry out any purpose in a manner to disburb the public peace. However, we can only speculate that the owners of the legs were participants in an assemblage or that Hogenauer had any intended purpose with them, or they with him. The statute requires "three or more persons [to] assemble . . . with the intention of carrying out any purpose in such a manner as to disturb the public peace." The exhibit does not show such, nor is there any other testimony to fill this gap in the proof.

It should be borne in mind that this is not a conviction for trespass or for breach of the peace, but for unlawful assemblage. Assemblage, in the terms of the statute, must be proved. If the Government chose to try these defendants in a consolidated trial, it was not relieved of proving the essential details of its case as against each individual defendant, to the same extent as if the trials were separate. This the Government failed to do as to Mr. Hogenauer and Mrs. Gottfired. Their convictions should be reversed.

III.

The Defendant Hogenauer's Failure to Stand Up at the Adjournment of Court Did Not Constitute Contempt of Court

The court, in a summary proceeding under Federal Criminal Procedure, Rule 42(a), adjudged defendant Hogenauer in contempt of court for refusal to obey the court's order to stand up for the adjournment of court at the end of the trial (R. 66-73). This refusal to rise took place directly after the court had given its oral opinion in which appellants were found guilty of unlawful assembly (R. 66-67). Several weeks later, the court sentenced Mr. Hogenauer to fifteen days' imprisonment therefor (R. 73). The reasons for defendant's failure to rise, appear to stem from a reluctance to paying allegiance to "forms and symbols," rather than from any attitude of disrespect toward the court or the United States (R. 57-58, 70). Whatever his reason for not rising we submit that it did not constitute contempt of court. It could not be said that his failure to rise at adjournment disrupted the hearing or obstructed court proceedings

or interfered with the administration of justice. The trial was over; the finding of guilt had been made. The only remaining act was to adjourn the court.

18 U.S.C. §401 defines the applicable provision of contempt as:

> "(1) Misbehavior of any person in [the Court's] presence or so near thereto as to obstruct the administration of justice.
>
> "(3) Disobedience or resistance to [the Court's] lawful command."

The most that could be said of defendant's conduct is that it was a failure to perform a ceremonial and customary act of respect to the court. It was not an affirmative act of insult to the court. To empower a court to require affirmative acts of respect by threat of jail is neither necessary to the process of justice nor conducive to the development of genuine respect. There is an inherent paradox in commanding respect by the threat of imprisonment.

We do not mean to imply that we applaud or support Mr. Hogenauer's failure to rise. We have risen appropriately in the past and expect to continue to do so. But we do so voluntarily and as an indication of our genuine respect for the judicial process—not from fear of fine or imprisonment. As this court said in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624-671, 87 L.Ed. 1628 (1942), at pages 632-3:

> "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."

and later, in a concurring opinion, at page 644:

> "Words uttered under coercion are proof of loy-

> alty to nothing but self-interest. Love of country must spring from willing hearts and free minds inspired by a fair administration of wise laws. . . ."

In the instant case, it may similarly be said that a gesture of respect for the court, compelled by a jail sanction, is a worthless act at best and at worst derogates from true respect for the seats of justice. The court's order to Mr. Hogenauer to stand for the purpose of showing his respect to the court was unnecessary and therefore under these circumstances beyond the power of the court. We submit that Mr. Hogenauer was not in contempt of court.

IV.

Summary Proceedings Under Rule 42(a) Were Not Warranted Here

The summary procedure permitted by Rule 42(a) permits a criminal sentence to be imposed with none of the procedural protections provided by the Constitution. In such a proceeding the court is the prosecuting witness, the prosecuting attorney, the jury, and the sentencing court. Even though the judge is the quasi-victim of the alleged contempt, he certifies as to what took place with no opportunity for the accused to contradict the certificate. This power is an awesome power not permitted to any other branch of the government. Because of this, its exercise has been limited to those situations where summary action is required to prevent the obstruction of justice. The court stated *In re McConnell,* 370 U.S. 230, 8 L.Ed. 434, 82 S.Ct. 1288 (1962), at page 233:

> "The statute under which petitioner was summarily convicted of contempt is 18 U.S.C. §401, which provides that:
>
> "A court of the United States shall have power

to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice. . . .

"This section is based on an Act passed in 1831 in order to correct serious abuses of the summary contempt power that had grown up and was intended as a 'drastic delimitation . . . of the broad undefined power of the inferior federal courts under the Act of 1789,' revealing 'a Congressional intent to safeguard Constitutional procedures by limiting courts, as Congress is limited in contempt cases, to "the least possible power adequate to the end proposed." The exercise by federal courts of any broader contempt power than this,' we have said, 'would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury.' And we held long ago, in *Ex parte Hudgings*, that while this statute undoubtedly shows a purpose to give courts summary powers to protect the administration of justice against immediate interruption of court business, it also means that before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice:"

and at page 236:

"To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent an actual obstruction of justice. . . ."

Similarly, in *Harris v. United States,* 382 U.S. 162, 15 L.Ed.2d 240, 86 S.Ct. 352 (1965):

"[1] Rule 42(a) was reserved 'for exceptional circumstances,' *Brown v. United States,* 359 U.S. 41, 54, 3 L.Ed.2d 609, 619, 79 S.Ct. 539 (dissenting opinion), such as acts threatening the judge or dis-

> rupting a hearing or obstructing court proceedings. *Ibid.* We reach that conclusion in light of 'the concern long demonstrated by both Congress and this court over the possible abuse of the contempt power,' *Ibid.*, and in light of the wording of the Rule. Summary contempt is for 'misbehavior' (*Ex parte Terry,* 128 U.S. 289, 314, 32 L.Ed. 405, 412, 9 S.Ct. 77), in the 'actual presence of the court.' Then speedy punishment may be necessary in order to achieve 'summary vindication of the court's dignity and authority.' *Cooke v. United States,* 267 U.S. 517, 534, 69 L.Ed. 767, 773, 45 S.Ct. 390. But swiftness was not a prerequisite of justice here."

Similar holdings are found in *Parmelee Transportation Co. v. Keeshin,* 292 F.2d 806 (C.C.A. 7, 1961); *United States of America v. Galante,* 298 F.2d 72 (C.C.A. 2, 1962).

In the instant case, there was no threat to the judge, nor disruption of a hearing. At most there was a failure of good manners toward the court. Swiftness was not a prerequisite of justice here. If there was anything contemptuous in Mr. Hogenauer's conduct, it could have been handled by the normal criminal procedures. The fact that the alleged contempt occurred on December 26, 1967, and the sentencing was ordered January 19, 1968 (R. 66, 68), is indicative of the absence of any need for swiftness. Moreover, as was pointed out earlier, the trial of the defendants had been concluded, and the finding of guilt had been rendered. Justice was in no way obstructed by Mr. Hogenauer's failure to rise. Summary action was not required by the situation and not authorized by Rule 42(a).

CONCLUSION

R.C.W. 9.27.060(2) being unconstitutional on its face, the conviction of each of the appellants should be re-

versed and the U.S. District Court for the Western District of Washington, Northern Division, be directed to dismiss the government's complaint.

The charges against appellants Gottfried and Hogenauer should be dismissed because of appellee's failure to establish that either appellant was assembled with others or had a common purpose with others.

The conviction of the appellant Hogenauer for contempt of court should be reversed in that the actions of appellant were not obstructive of court procedure or interfered with the administration of justice.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RONALD J. MELTZER
Of Attorneys for Appellants

APPENDIX A

Table of Exhibits*

Plaintiffs:

Number	*Offered*	*Admitted*	*Rejected*
3	13	16	
4	16	39	
5	16	39	
6	44		93
7	46		93
73		76	

*All page references are to the transcript.